IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL No. 261 OF 2020

RUSTICA MWALYOSI.....APPELLANT

VERSUS

RAPHAEL MWALYOSI.....RESPONDENT

(From the decision of the District Court of Kinondoni)

(Mwakalinga- Esq, SRM)

dated 19th August 2020

in

Matrimonial Cause No. 102 of 2019

JUDGEMENT

20th April & 27th May 2021

Rwizile, J

In 1981 parties to this appeal contracted a Christian marriage, and lived as husband and wife since then. They were not blessed with a child, yet it was a happy marriage. The parties were both employed. Appellant was working with shirika la magari, while respondent was employed with RUBADA. In 1984 respondent was employed by University of Dar es Salaam where he was working as senior researcher at the IRA department. in 1989 the parties travelled to Norway for the respondent to pursue his PhD. When in Norway, appellant accused respondent to have infected her with STDs (i.e. gonorrhoea). their marriage became tart after they came back from Norway, when appellant asserted that respondent was having marital relationship with several women, which resulted into her being diagnosed with AIDS in 2000. Their relationship became worse after respondent's accusation that appellant had poisoned him, he decided to leave his matrimonial home. Appellant was left behind and respondent

refused to maintain her, she therefore filed a matrimonial cause no. 102/2019 at Kinondoni district court. the case was heard, the decree of divorce was granted, and some of the matrimonial properties were divided between the parties, leaving other properties undivided. This decision aggrieved appellant who is now before this court appealing on three grounds that;

1. *The trial magistrate erred both in law and fact when he apportioned matrimonial properties without considering the contribution of the petitioner in acquiring the matrimonial properties*
2. *The trial magistrate erred both in law and fact when he removed without giving reasons the landed property on premises designated as plot at Kigamboni- kibada, a house at Kihesa- Iringa, two houses at in-laws village Mlangali, Njombe, tree farms- 17 acres and 3 cows at Mlangali Iringa from among the matrimonial properties while those properties were jointly acquired by efforts of the parties hereinabove.*
3. *The trial magistrate erred both in law and fact when refrained from issuing an order for maintaining the appellant.*

The appellant, asked this court to allow the appeal by reversing the trial court's decision.

At the hearing the parties were represented. For the appellant was Mr Chingóta learned advocate while Mr Msovela learned advocate appeared for the respondent. The appeal was argued by written submission.

Supporting the appeal, Mr Muganyizi learned advocate submitted on ground one and two that, section 114 of Cap 29 gives the court power to divide matrimonial properties to spouses. He said, it was an error for the trial court to remove some of the matrimonial properties from being divided. His argument was, those properties were either acquired during subsisting of the marriage by the parties or improved during the same. He cited section 114 of the Marriage Act, [**Cap 29 RE 2019]**, (*herein referred as* the Act) to support his argument.

He asserted that, appellant contributed for the acquiring of the same. He added, even if the extent of contribution might differ, but according to him domestic chores are

termed to be contribution towards acquiring of matrimonial properties. He referred to the case of **Bi. Hawa Mohamed Vs Ally Seif** [1983] TLR 32.

Moreover, he mentioned the house at Kihesa Iringa, two houses at Mlangali Iringa, a plot at Kigamboni and one car make Land Cruiser are properties acquired during marriage. He said, a house at Mlangali was built at the respondent's family plot but the same was improved during marriage, according to learned advocate the same form part of matrimonial property as per section 114(3) of the Act. He also of the opinion that, a house at kihesa which was alleged by the respondent that he bought for his daughter, learned advocate said the same is unjustifiable as per section 59(1) of the Act.

As for the last ground he argued, it was not proper for the trial court to deny appellant maintenance, by reason that there were no issues of marriage. Learned advocate asserted that, the same was misconceived since, he said, there is no law requiring for the same. He based his support on the law of Marriage under section 110(3). He then prayed for this appeal to be allowed.

Disputing the appeal, Mr Assenga argued by stating that, this appeal is improperly before this court since it was filed under petition of appeal instead of memorandum of appeal. His view was, the same deserve to be dismissed.

When arguing the grounds of appeal, he argued in the same manner submitted by the appellant. As for ground one and two, he said the properties which were left by the trial court undivided are those which were neither pleaded by the appellant in the petition of appeal nor proved to exist during the trial.

According to him, the old house at Kimara butcher is the only property acquired during the subsisting of marriage between the parties. He added that, even the one storey building on the same plot was acquired by the respondent alone when they were separated.

He said, the house at Mlangali were built at the family plot, the same was not matrimonial property, leave alone the house at Kihesa which belongs to the respondent's daughter. According to him a plot at Kibada and a land cruiser are respondent's personal properties. His argument based on the cases of **Gabriel**

Nimrod Kurwijila Vs Theresia Hassani Malongo, Civil Appeal No. 102/2018 and **Pulcheria Pandugu Vs Samwel Pandugu** [1985] TLR 7, that, appellant did not prove her extent of contribution towards acquiring of the same. Learned advocate stated that section 59 of the Act cited by appellant is irrelevant in this appeal at hand, since he said, there was no involvement of the appellant in buying the house at kihesa.

It was his argument regarding a 17 acre of tree farm that, the same was a new fact/ground since it was not pleaded in the petition of divorce. He said, the respondent denied existence of the same, so he added it was the appellant duty to prove its existence during trial. He stated further that, it is elementary principle in Evidence that whoever alleges must prove. He cited section 111 of the Evidence Act, to support his argument.

He submitted on the last ground that, the trial court did not order the appellant to be maintained for the reasons that, she was given health insurance card at the tune of 1,500,000/= by the respondent. He added, it was not denied by the appellant when it was said that she rented some of the rooms in the house which she is staying and earning some income. He stated further that, the respondent is not employed anymore since he retired, so he cannot maintain the appellant. He cited the case of **Chigoli Gomahingo vs Wilson Mchane** [1983] TLR 311, to support his argument.

He therefore prayed for the appeal to be dismissed with costs, judgement and decree of the trial court be upheld and any other relief this court may deem fit to grant.

When re-joining, appellant said the objection by the advocate for the respondent is baseless since he said whether this appeal is filed under the head- memorandum or petition it does not matter, what matters according to him is, it is an appeal.

He said the advocate argument that one storey building built on a plot at Kimara is not matrimonial property is false. He said the same contradicts the respondent's testimony at page 23, 3rd paragraph of the proceedings.

He said the same applies to the other properties which respondent admitted in his testimony at the trial court, to have been acquired or developed during subsisting of their marriage. He therefore said the case of **Gabriel Nimrod Kurwijila (supra)** does not support the respondent but rather the appellant.

For the last ground, learned advocate submitted that, appellant is entitled to maintenance since she has no means of earning income. He said the trial court ought to have considered the degree of responsibility apportioned to each party and customs of their community. He therefore reiterates his prayer that this appeal be allowed.

After a careful consideration of the submissions of the parties and the records of the lower court, but before going to the merit of this appeal, in the respondent's submission learned advocate raised an objection that, this appeal is improperly before this court for it being filed under petition of appeal instead of memorandum. According to him the same has to be dismissed.

As much as I agree with the learned advocate that this appeal ought to have been entitled *Memorandum of Appeal* and not *Petition of Appeal*, as per Rule 37 of GN No. 246 of 1997, it is my considered view that, this defect is cured by overriding objective rule under section 3A and 3B of the Civil Procedure Code, which this court is enjoined to apply. It is as the appellant's lawyer put it, defect that does not go to the root of the appeal. whether brought under the head- *petition* or *memorandum*, still it remains an appeal in the meaning of the law.

It should be noted further that the same was filed in the District Court on 19th September 2020 and admitted by Senior Resident Magistrate in charge. So, the allegation that the petition was not been filed at the District Court is baseless and appears to me as an illusion on party of the respondent.

Coming to the merit of this appeal, I noted an irregularity in the proceedings of the trial court which renders the whole proceeding a nullity. I say so because, it is settled that, when it comes to the hearing of the matrimonial proceedings in the subordinate courts, the rules of procedure under the civil procedure code applies mutatis mutandis as provided under rule 29 of The Law of Marriage (Matrimonial Proceeding) Rules, GN No. 246/1997 which has to be read together with rule 2 of the same Rules. which for ease reference the same state that;

> *"subordinate court" means a court of a Resident Magistrate or a District Magistrate but does not include a primary court.*
>
> *29. (1) ……..*

*(2) The court shall proceed to try a petition in the same manner as if it were a suit under the Civil Procedure Code *, and the provisions of that Code which relate to examination of parties, production, impounding and return of documents, settlement of issues,* summoning *an attendance of witnesses, adjournments, hearing of the suits and examination of witnesses, affidavits, judgments and decrees shall apply mutatis mutandis to a trial of a petition***.**

Basing on the above it is crystal clear that, matrimonial proceedings before the district court has to be conducted like a normal suit under civil procedure code. Meaning, the rules on examination of parties, production, impounding and return of documents, settlement of issues attendance of witnesses shall apply the same in matrimonial proceedings.

Coming to this appeal, at the trial, parties tendered documentary evidence which were admitted and marked as exhibits but unfortunately the same were not endorsed by the court upon admitting them. This is fatal, because the law under Civil procedure code provides for endorsement as a legal requirement. It is provided under O. XIII R.4 of Civil Procedure Code. [Cap 33 R.E 2019], which for ease reference states that;

4.-(1) Subject to the provisions of the sub-rule (2), there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely-

(a) the number and title of the suit;

(b) the name of the person producing the document;

(c) the date on which it was produced; and

(d) a statement of its having been so admitted; and

(e) the endorsement shall be signed or initiated by the judge or magistrate.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the

original under rule 5, the particular aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initiated by the judge or magistrate.

For the foregoing, it is certain that failure of the court to endorse documents admitted in evidence is against clear provisions of the law. The point to be determined here is what is the remedy of this omission by the trial court. After, meditation, I have come to the conclusion that, in the circumstances of this case, the irregularity may be curable. It is my thinking that, since this has not been raised by the parties as to have occasioned failure of justice, It can be take that, it is a curable defect within the spirit and letter of the overriding objective principle as propounded under section 3A and 3B of the Civil Procedure Code. In my view, since the same were admitted, they did not expressly contravene O.XIII Rule 7(1)(2) of the code which states that;

7.-(1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

I find it a curable defect and proceed to determine the appeal on merit. In my determination grounds one and two will be dealt with together and generally while ground three will be separately handled.

It was appellant argument that, properties distributed by the trial court and those which were left undistributed are matrimonial properties acquired by the parties by their joint efforts. According to the learned advocate, it was an error for the trial court to apportion and leave some other properties out of the scope.

On this part I have to say, distribution of matrimonial properties depends on the extent of contribution towards acquisition of the same by the spouses. Other factors to be considered are such as, customs of the community to which parties belong, debt owing by either party or the needs of the children of the marriage. It is the rule that, properties deemed to be distributed, are those acquired by both spouses during the

subsisting of their marriage or those acquired by one party but substantially improved during marriage by the other party or by their joint efforts. The wording of section 114 of the law of Marriage Act, [Cap 29 R.E 2019] *herein referred as* the Act. for ease reference the same is hereunder reproduced;

> *114.-(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.*
>
> *(2) In exercising the power conferred by subsection (1), the court shall have regard to –*
>
> *(a) the customs of the community to which the parties belong;*
>
> *(b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;*
>
> *(c) any debts owing by either party which were contracted for their joint benefit; and*
>
> *(d) the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.*
>
> *(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.*

In this appeal, the question to be asked would be, did appellant prove the existence of the properties which were left undivided. It has to be noted that it was pleaded in at paragraph 9 of the petition properties acquired during their marriage, which she prayed for distribution. Among them are properties left undivided by the trial court. It is therefore not true as argued that properties not divided were the properties were not pleaded. In law, pleading a fact, is one thing and proving its existence is another.

Pw2 testified that, she knows the two houses which are on the same plot at Kimara. She did not know about other properties. She said, she was told about their existence. On cross examination she said so. For the sake of clarity let the record speaks for itself. At page 15 of the typed proceedings;

> *I know two houses at Kimara Butcher. I have been in that houses, others I know them by being told.*

It is therefore certain that the appellant failed to prove the existence of other properties apart from those two houses at Kimara. It is elementary that, in civil cases, whoever alleges must prove, see section 110 and 111 of the Evidence Act and cases of **Pauline Samson Ndawavya vs Theresia Thomasi Madaha,** Civil Appeal No. 45 of 2017, **Prisca Dastan Haule vs James William Lyimo,** Civil Appeal No. 199 of 2019).

I am therefore in agreement with the respondent that, the appellant failed to prove existence of the said properties. However, I share the appellant's view that, the respondent admitted that some of the properties were improved/developed during the subsisting of their marriage. For that reason, we cannot choose to ignore them only because they were not proved by the appellant in the first place. Doing that will be letting the administration of justice doomed.

The respondent testified to acquire two houses at Kimara during the subsisting of their marriage. He said the house at the village, Iringa was developed when he was a member of parliament. He was a member of parliament from 2005-2010 when their marriage subsisted. The other house at Iringa which she bought on auction was bought during the marriage. On this house, the respondent was required to prove if the same is in his daughter's name. Since, it the respondent who so alleged, he is cast with the duty to prove that the house belongs to his daughter.

It appears therefore that, apart from two houses at Kimara, the respondent proved the existence of other two houses which are both in Iringa.

As I said before, distribution of the same depends on the extent of contribution of each party in terms of work or money. Authorities to support this finding are not in short supply, see for instance the cases of **Bi Hawa Mohamed vs Ally Seif** [1983]

TLR 82, **Bibie Maulid vs Mohamed Ibrahim** [1989] TLR 162). In the case of **Bibie Maulid (supra)** the court held that;

> *Among the factors to be considered in deciding how much parties should get from the matrimonial assets when the marriage is dissolved are the extent of the contribution by each party and debts owing as well as the customs of the community and needs of the infant children. There were no children to the marriage.*

In this case it is not in dispute that appellant never contributed money when acquiring the said properties, what was transpired is that, she was maintaining welfare of the family as a wife. Since there is no evidence proving that she did not perform that duty wholly-heartedly. According to the case of **Bi Hawa Mohamed** (supra) her contribution should be considered in acquiring matrimonial properties. Although it does not entitle her a share, *pari-passu* with the appellant.

In my considered view, the decision of the trial court on distribution of matrimonial properties was not correct. I hold that, the two houses at Kimara, and two houses situated in Iringa are matrimonial properties jointly acquired. They are therefore subject of division. I hold the ration of 40% and 60% to appellant and respondent respectively. This therefore, determines the first two grounds.

The third ground of appeal dwells on maintenance of the appellant by the respondent. In law, this is allowed. It follows, the duty imposed on a husband to maintain his wife or wives. In terms stated under section 63 of the Act. It states as hereunder;

> *63. Except where the parties are separated by agreement or by decree of the court and subject to any subsisting order of the court-*
>
> *(a) it shall be the duty of every husband to maintain his wife or wives and to provide them with such accommodation, clothing and food as may be reasonable having regard to his means and station in life;*
>
> *(b) it shall be the duty of every wife who has the means to do so, to provide in similar manner for her husband if he is incapacitated, wholly*

or partially, from earning a livelihood by reason of mental or physical injury or ill-health.

From the above, maintenance as duty of husband follows in the letter and spirit stated above. But in case of divorce or separation, there is no automatic right for the husband to maintain his divorced wife. In actual fact, court are warned to make such orders unless under special circumstances not limited to those falling under section 115(1) of the Act. Which states as follows;

115.-(1) The court may order a man to pay maintenance to his wife or former wife-

(a) if he has refused or neglected to provide for her as required by section 63;

(b) if he has deserted her, for so long as the desertion continues;

(c) during the course of any matrimonial proceedings;

(d) when granting or subsequent to the grant of a decree of separation;

(e) when granting or subsequent to the grant of a decree of divorce;

(f) where the parties were married in Islamic form, for the customary period of iddat following the date on which the divorce takes, or is deemed to have taken, effect;

(g) if, after a decree declaring her presumed to be dead, she is found to be alive:

The appellant only prayed for maintenance. She did not endeavour to prove to the trial court that she deserves such an order. In the absence of such evidence. It was not, in my considered view reasonable for the trial court to order so. By not granting the same, I think, the trial court was right. Above all, the respondent as it has been shown is now retired. He may not be in the position to have such means. Afterall, the appellant did not establish he has means to that effect. Therefore, this third ground has no merit. It is dismissed. For the foregoing reasons, this appeal is partly allowed to the extent explained. No orders as to costs.

AK Rwizile
JUDGE
27.05.2021

Delivered this 27th day of May 2021

AK Rwizile
JUDGE
27.05.2021

Recoverable Signature

X

Signed by: A.K.RWIZILE

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY